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82-1786

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

RALPH TRAINELLO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege is applicable to a communication which concerns but in no way furthers the client's ongoing criminal activity.

2. Whether the attorney-client privilege is applicable to a communication, between an attorney-accountant and the principal of a corporation for which he prepares tax returns, concerning the nature and deductibility of illegal labor payments made by the corporation.

Parties to the proceeding in the Court of Appeals were The United States of America and Ralph Trainello.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 17, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, being informal, will not be officially reported. It is bound with this Petition as the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 17, 1983. A timely petition for rehearing *en banc* was denied on March 1, 1983. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

EVIDENTIARY PROVISION INVOLVED

The pertinent provision of Rule 501 of the Federal Rules of Evidence ("FRE") reads as follows:

> Except as otherwise [provided] . . . , the privilege of a . . . person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

A. *The Case in General*

From 1974 through 1977, Petitioner, an attorney, was a principal in Aberdeen Associates, Inc. ("Aberdeen") and its successor, RNT Associates, Inc. ("RNT"). Each was a construction company engaged in a business affecting interstate commerce. Certain of their employees were members of Local 29 of the Blasters, Drillrunners and Miners Union.

The jury's verdict of guilt demonstrates that it found as follows: during the period involved, Petitioner caused Aberdeen and RNT to make cash payments to one Louis Sanzo, an officer of Local 29. Those payments were disguised by Petitioner in the books of those two corporations, thus assisting Sanzo to evade taxes. Petitioner improperly caused those payments to be deducted as corporate business expenses, thus lessening his own as well as the corporate taxes.

Based on the foregoing factual findings, Petitioner was convicted of violations of 18 U.S.C. §§371 and 1962(c) and of 26 U.S.C. §§7201 and 7206.[1] He was sentenced to a term of imprisonment for three years and a fine of $30,000.

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[1] Petitioner was actually thrice placed on trial under the same indictment. He was granted a severance during his first trial with five co-defendants. His second trial resulted in a hung jury for him and an acquittal for a co-defendant. It is Petitioner's conviction when tried alone in the third trial which brings him to this Court.

B. *The Facts Raising the Privilege Issue*

The crucial evidence against Petitioner was given by attorney-accountant Robert Katz, who was hired by Petitioner in 1973 to do accounting work for Aberdeen and who became Aberdeen's controller in 1974. In 1974 and 1975, in addition to doing Aberdeen's tax returns, he did Petitioner's personal joint tax returns and was Petitioner's financial advisor and legal counselor in the tax area.

Katz testified that sometime in 1974, while reviewing Aberdeen's books in connection with the preparation of corporate tax returns, he noticed a number of $500 cash items entered in the "field expense" column. He asked Petitioner what those sums reflected and was told that they were "payments" that were "necessary to keep the jobs going." Katz then advised Petitioner, in a discussion that "centered around payments that might be considered to be payoffs" or "bribes," that such payments were not deductible as business expenses on the corporate tax return.[2]

REASONS FOR GRANTING THE WRIT

A. The Second Circuit's Holding That the Attorney-Client Privilege Is Inapplicable When the Communication Merely Concerns Rather Than Furthers Ongoing Criminal Activity Is in Conflict with the Rule in Other Circuits and Settled Common Law

The conversation which Katz had with Petitioner clearly *concerned* ongoing criminal activity, since the illegal payments continued after the conversation; there was no suggestion, how-

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[2] The introduction of Katz' testimony was objected to on privilege grounds at the second trial, the objection being overruled. The transcript of the third trial does not disclose a renewal of the objection. Before argument in the Second Circuit, Petitioner moved to correct the record pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure. In support of the motion, his two trial counsel swore that the objection had been made on the same ground as at the second trial. Government trial counsel stated he has no specific recollection. The trial court, which likewise had no specific recollection, suggested to the Second Circuit that it give "due consideration to the memories of the defense attorneys at trial." The Second Circuit assumed the privilege had not been waived.

ever, that that activity was in any way furthered or sought to be furthered by the conversation. Nonetheless, the Second Circuit held that "whatever communications took place were in connection with ongoing criminal activities and therefore not protected . . . ."[3]

It appears that not a single other Circuit Court has ever held that the attorney-client privilege is inapplicable merely because the communication involved *concerned* ongoing criminal activity.[4] Those which have dealt with the issue, however, have recognized the settled common law principle that the privilege is inapplicable to a communication which either furthered or was intended to further such illegal activity[5]—a principle which has been recognized by this Court.[6]

That the exception, properly understood, applies solely to communications in *furtherance* of wrongdoing is shown by nu-

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[3] In so holding, the Second Circuit cited only one of its own decisions: *Matter of Doe*, 551 F.2d 899, 901-02 (2d Cir. 1977). There, however, what was involved was a communication relating to a scheme to bribe a juror in a criminal case then on trial—a far cry from the present situation. The necessity of reporting to the court a fraud then being perpetrated upon it has long been recognized. We respectfully submit that a case such as *Doe*, which merely applies that long-understood rule, should not be deemed authority for a drastic change in the long-understood scope of the exception to the privilege.

[4] An occasional case refers to communications concerning or relating to ongoing wrongful activity when stating the rule, but does so in the context of a communication clearly in furtherance of that activity. *See, e.g.: Grieco v. Meachum*, 553 F.2d 713, 718 n.4 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976); *United States v. Hoffa*, 349 F.2d 20, 37 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966).

[5] *See, e.g.: In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982); *In re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979); *Union Camp Corp. v. Lewis*, 385 F.2d 143, 144 (4th Cir. 1967); *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 203 (5th Cir. 1981); *United States v. Aldridge*, 484 F.2d 655, 658 (7th Cir. 1973); *In re Berkley & Co., Inc.*, 629 F.2d 548, 553 (8th Cir. 1980); *United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977); *In re September 1975 Grand Jury Term*, 532 F.2d 734, 737 (10th Cir. 1976).

[6] *See, e.g., United States v. Clark*, 289 U.S. 1, 15 (1933) ("A client who consults an attorney for *advice that will serve him in the commission of a fraud* will have no help from the law.") (Emphasis added).

merous other authorities,[7] the most important of which is Supreme Court Standard 503(d)(1) which reads:

> There is no privilege under this rule . . . if the services of the lawyer were sought or obtained *to enable or aid anyone* to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud . . . . (Emphasis added.)

The fact that the standard was not enacted by Congress[8] does not diminish the persuasiveness of the proposition that it accurately states the common law on the subject.[9] Indeed, as the court stated in *In re Grand Jury Proceedings*, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978):

> What more accurate expression of the principles of the common law and of the application of reason and experience could exist than a draft that was developed by a representative committee of bench, bar and scholars, twice published and commented on by the bench and bar, adopted by the Judicial Conference and finally forwarded by the Supreme Court to Congress for promulgation.

In this case attorney-accountant Katz asked Petitioner about certain expenses which were clearly relevant to Katz' preparation of corporate tax returns—a clearly legal function. *See, e.g.*,

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[7] *See, e.g.*: 8 Wigmore, *Evidence* §§2298, 2299 (McNaughton rev. 1961); McCormick, *Evidence* §95 (2d ed. 1972); 2 Weinstein, *Evidence* ¶503(d)(1)[01] (1982 ed.) (no privilege when the "services were sought to enable the commission of the wrong").

[8] The original draft of Article V of the Rules contained nine separate privileges. The attorney-client privilege, as above described, was *not* among the six subjected to Congressional attack, but nonetheless died with the rest. *See* Saltzburg & Redden, *Federal Rules of Evidence Manual* 231 (3d ed. 1982).

[9] The distinction between a communication which furthers a crime or fraud and one which merely concerns it is a real one, clearly capable of being recognized by bench and bar. It is analogous to the distinction between a conspirator's admissible statement in furtherance of a conspiracy and his inadmissible mere narrative of past conspiratorial acts. *See, e.g., United States v. Castillo*, 615 F.2d 878, 883 (9th Cir. 1980). Indeed, FRE 801(d)(2)(E) preserved, after considerable debate, the distinction in the hearsay area which the Second Circuit has, in this case, abandoned in the area of privilege.

Matter of Colton 201 F. Supp. 13 (S.D.N.Y. 1961), *aff'd*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963). When Petitioner told him that the payments involved payoffs, Katz advised him that the law prohibited declaring such payments as business expenses—clearly proper advice on the law. In sum, there was nothing improper about the conversation. Petitioner thereafter ignored his attorney's advice and deducted the payments. The conversation between Petitioner and Katz, which constitutes the only evidence about which we complain here, cannot possibly be characterized as having been in *furtherance* of a crime. Nor can Petitioner's later conduct logically be said to have changed the character of the conversation he had with his attorney.[10]

The Second Circuit's ruling is a drastic departure from the common law and cannot be justified. It should be reviewed and rejected by this Court.

There exists an additional but related reason why this Court should grant the writ. This case involves a question of privilege and ethics which deeply divides the bar—*viz*, what is the obligation of an attorney who learns from his client that the client is engaged in ongoing criminal or fraudulent activity. That this question divides the bar is shown by the February 1983 vote of the American Bar Association's House of Delegates with respect to certain amendments to the Kutak Commission's proposed Model Rules of Professional Conduct.[11] The delegates, acting

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[10] A single example should illustrate Petitioner's position. One who is distributing a certain film seeks legal advice as to whether it is obscene (and thus whether he is involved in ongoing criminal activity). The lawyer whose advice he seeks views the film and tells him that it is indeed obscene and that he should have nothing further to do with it. The client decides to ignore the advice. Later, the attorney (who never was asked and never advised the client how he could continue to violate the law with impunity) is called before a grand jury and asked: (a) whether the client admitted that he was distributing the film; and (b) whether he advised the client that the film was obscene. Petitioner submits that the attorney-client privilege would clearly apply. Under the Second Circuit's new rule, however—since the communication *concerned* the ongoing distribution of obscene matter even though it did not *further* it—the privilege would *not* apply.

[11] The ABA proceedings have not yet been officially reported. Authority for the factual statements about those proceedings is articles appearing in *The New York Times* on February 8, 9, and 14, 1983.

upon amendments proposed by the American College of Trial Lawyers, rejected a Kutak Commission proposal that would have permitted an attorney to disclose a client's ongoing crime or fraud in order to protect prospective victims. They instead voted 207 to 129 to prohibit such a disclosure under pain of professional discipline. Moreover, by a vote of 188 to 127, they extended the prohibition to include even cases where by his silence the attorney might be deemed to be "assisting a criminal or fraudulent act by a client."[12]

It is anticipated that the rule requiring non-disclosure will be adopted at the ABA's August 1983 annual meeting. Its adoption will undoubtedly have a great influence upon the state courts and other bodies which promulgate binding rules for attorneys and which will soon thereafter begin to consider local adoption of the rule requiring non-disclosure. Petitioner submits that this case presents to the Court an opportunity to resolve this question which has so seriously divided the bar and which is about to be considered by various governing bodies throughout the nation.

B. The Second Circuit's Holding That an Attorney-Accountant Spoke to Petitioner as an Accountant Rather Than as an Attorney Was Based on an Erroneous Standard Which, if Generally Applied, Would Jeopardize the Privilege Whenever Attorneys Also Act as Accountants and Financial Advisors

The Second Circuit denied the applicability of the privilege by holding that:

> Katz was an accountant as well as an attorney, and he apparently was acting in the former capacity when he inquired of Trainello, who was himself a lawyer, about the miscellaneous field expense entries.

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[12] The correction of client perjury or fraud upon a court was made an exception to the rule of non-disclosure by a vote of 209 to 101.

The existence of significant evidence to the contrary[13] suggests that, in so holding, the Second Circuit was guided by an unarticulated standard so narrow as to seriously jeopardize the application of the privilege whenever the attorney involved also acts as an accountant.

Petitioner recognizes that there is no accountant-client privilege and relies on none. He also recognizes that the mere fact that Katz was a lawyer does not mean that an otherwise unprivileged disclosure to him became privileged. *See, e.g., Matter of Colton, supra*, 201 F. Supp. at 16 ("Clearly, when a person who incidentally happens to be a lawyer is hired solely as an accountant, the privilege is inapplicable."). But the reverse is likewise true. *See, e.g., United States v. Schoeberlein*, 335 F. Supp. 1048, 1057 (D.C. Md. 1971) ("The fact that . . . [the attorney] is an accountant as well as a lawyer does not, of course, foreclose him from invoking the attorney-client privilege on appropriate occasions."). Petitioner submits that this case deals with just such an occasion unless "appropriate" is to be defined so as virtually to repeal the privilege.

In *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981), rejecting a narrow interpretation of the scope of the privilege, this Court stated that:

> the privilege exists to protect not only the giving of professional advice to those who can act on it but also

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[13] Not being a C.P.A., Katz' sole profession was that of attorney. His legal specialty was taxes, and it was for the purpose of obtaining information in connection with the preparation of corporate tax returns that he inquired of Petitioner about the cash item entries in Aberdeen's records. The conversation which then ensued revolved around "payoffs" and "bribes" and their deductibility as business expenses. The advice he gave Petitioner was the clearly legal advice that such cash payments were not lawful business deductions on corporate tax returns. That advice also had relevance to Petitioner's personal income tax situation, and it was Katz who prepared Petitioner's personal tax returns. The conversation took place in private, and Katz never disclosed to anyone—until subpoenaed before the grand jury—what Petitioner had told him about the "payoffs' and "bribes." Perhaps most important is Katz' testimony before the grand jury:

> I think he was asking me in my capacity as an attorney, and I think in that frame he was asking for legal advice.

The record appears barren of indicia that Katz spoke to Petitioner solely or even predominantly as an accountant.

> the giving of information to the lawyer to enable him to give sound and informed advice.

We submit that the conversation between Katz and Petitioner involved an interchange of professional advice and client information. The fact that Katz had accounting as well as legal functions to perform for both Aberdeen and Petitioner is irrelevant.

In *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 147 (D. Del. 1977), the court correctly recognized that:

> business and legal advice may often be inextricably interwoven. A single proposed course of conduct . . . will have both legal and business ramifications, and the lawyer may advise as to both.

And in *Colton*, *supra* at 16-17, the court stated that:

> Considering the complexities of modern tax law, it would seem that an attorney who prepares tax returns for a client is primarily engaged in performing legal services, and that information communicated to such an attorney for the purpose of enabling him to prepare the return should be held to come within the attorney-client privilege.

That statement could very well have been written for this case.

In holding that Katz acted as accountant rather than attorney, the Second Circuit articulated no standard by which it shaped its judgment. Since it had before it substantial evidence suggesting the contrary conclusion,[14] and since it obviously did not ignore that evidence but had to accommodate it, the standard which it applied had to be an extremely narrow one—so narrow as to constitute a virtual repeal of the privilege whenever an attorney is also an accountant and the communication in question deals with financial or tax matters. Such an implicit repeal is a serious departure from the rationale of *Upjohn* and numerous other cases dealing with the privilege. The Second Circuit's ruling should be reviewed and rejected by this Court.

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[14] See the facts set forth in note 13 *supra*.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

United States Court of Appeals
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January , One Thousand Nine Hundred and Eighty-three.

PRESENT:
HONORABLE JAMES L. OAKES,
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
Circuit Judges

UNITED STATES OF AMERICA,
Appellee,

ORDER
82-1726

–v.–

RALPH TRAINELLO,
Appellant.

Ralph Trainello appeals from a judgment of the United States District Court for the Eastern District of New York convicting him after a jury trial before Judge Costantino of conspiracy to conduct the affairs of Aberdeen Associates, Inc. and RNT Associates, Inc. through a pattern of racketeering activity, 18 U.S.C.

§ 1962(c), of conspiracy to defraud the government in its collection of taxes, 18 U.S.C. § 371, and of making false statements on his personal and corporate tax returns, 26 U.S.C. §§ 7201, 7206. Finding appellant's several claims of error to be without merit, we affirm.

The district court did not commit reversible error when it received the testimony of attorney Robert Katz. Assuming for the argument that appellant did not waive his objection to this testimony, he has not shown that his statements to Katz were made for the purpose of obtaining legal advice. Katz was an accountant as well as an attorney, and he apparently was acting in the former capacity when he inquired of Trainello, who was himself a lawyer, about the miscellaneous field expense entries. The burden was on Trainello to establish that Katz was acting as an attorney at the time of the incident in question, *see In re Katz*, 623 F.2d 122, 125 (2d Cir. 1980), and this burden was not met. Moreover, it appears that whatever communications took place were in connection with ongoing criminal activities and therefore not protected in any event. *Matter of Doe*, 551 F.2d 899, 901-02 (2d Cir. 1977).

The prosecutor's comments on summation concerning the absence of evidence about threats did not deprive Trainello of a fair trial. Examining the statements in the context of the entire summation, and giving due deference to the ruling of the trial judge, *United States v. Sindona*, 636 F.2d 792, 806, 807 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), we conclude that the prosecutor was commenting on Trainello's "failure to support his own factual theories with witnesses", *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977), and not on matters as to which only Trainello could testify. *See United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981); *United States v. Bubar, supra*, 567 F.2d at 199.

The trial court did not commit plain error in its charge to the jury. The court properly instructed the jury on the elements of the offenses, and there was no real dispute as to the status of Aberdeen and RNT Associates as "enterprises", Trainello's association with Aberdeen, and Trainello's signature on the 1974

corporate return. Assuming that extortion payments may be deducted as theft losses, they may not be deducted as business expenses.

Trainello's remaining arguments are meritless. There was sufficient evidence to support Trainello's conviction on the conspiracy count. *See United States v. Sanzo*, 673 F.2d 64, 69 (2d Cir.), *cert. denied*, 51 U.S.L.W. 3233 (October 4, 1982). Trainello's challenge to the predicate offenses under the RICO count is foreclosed by this Court's decision in *United States v. Scotto*, 641 F.2d 47, 55-57 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

Judgment affirmed.

HONORABLE JAMES L. OAKES

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

HONORABLE THOMAS J. MESKILL